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In the Supreme Court of the United States

OCTOBER TERM, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, CROSS-APPELLANTS

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE CROSS-APPELLANTS/APPELLEES

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-515

SABLE COMMUNICATIONS OF CALIFORNIA, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES

No. 88-525

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, CROSS-APPELLANTS

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE CROSS-APPELLANTS/APPELLEES

In our opening brief, we argued (at 22-36) that the Court should apply the context-specific analysis of *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978), and uphold Section 223(b)'s ban on indecent commercial interstate telephone communications against Sable's facial challenge. We contended that the law is justified under the First Amendment by a distinctive combination of factors in a context similar to that presented in *Pacifica*—the accessibility of the telephone medium to children; the compelling governmental interest in preventing children (especially younger chil-

dren from hearing patently offensive sexual speech without parental supervision, especially in the privacy of the home; the reasonable congressional judgment that no lesser measure would reliably prevent children's access; and the availability of alternative sources of such speech for adults who wish to obtain it. In these circumstances, whatever the precise standard to be applied by the Court, the commercial indecency ban should be upheld. Indeed, the law meets even Sable's test (Br. 19) that the law "must be narrowly drawn and must further a sufficiently substantial government interest." *Schad* v. *Mount Ephraim,* 452 U.S. 61, 68 (1981).

We also showed in our opening brief (at 36-45) that Sable's facial constitutional attack on Section 223(b)'s ban on obscene commercial interstate telephone communications is meritless. Obscene speech may be banned because it is outside the First Amendment's protection, and the statute incorporates proper standards for defining obscenity consistent with this Court's decisions in *Miller* v. *California,* 413 U.S. 15 (1973), and its progeny. Moreover, even if "local" community standards are used to define obscenity, we argued, Section 223(b)'s legitimate ban on speech that is obscene in a particular community is not facially infirm on the ground that the same speech might not be obscene elsewhere: the statute is plainly capable of valid application, given a proper venue and choice of community standards (issues that should be raised in a particular enforcement proceeding); and, in any event, Congress may validly impose on Sable the duty to avoid transmitting to particular communities speech that is obscene in those communities.[1]

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[1] We also pointed out (Gov't Br. 43-45) that the obscenity and indecency bans are severable. Sable has now abandoned its earlier argument to the contrary. Br. 11 n.12.

A. *No. 88-525 (Indecency)*

1. Notwithstanding Sable's contrary suggestions (Br. 17, 20), the scope of "indecent" as used in Section 223(b) is not really in dispute. Congress did not use the term to refer to all speech that is "unseemly" or "altogether unbecoming" or not in conformity "with accepted standards of morality"; nor did it use the term to refer to "all 'sexually explicit or suggestive messages.' " Br. 17, quoting Gov't Br. 5.[2] Rather, as the legislative history shows (Gov't Br. 18-19), speech is not "indecent" within the meaning of Section 223(b) unless it " 'describes, in terms patently offensive as measured by contemporary community standards for the [telephone] medium, sexual or excretory activities and organs.' " *Pacifica,* 438 U.S. at 732 (quoting FCC definition).[3] Patent offensiveness (along with interstate sale of the speech for commercial purposes) is thus required before speech falls within Section 223(b)'s ambit.

In part for that reason, Sable's vagueness challenge (Br. 32-37) is without merit. First, the court in *Pacifica* upheld an administrative finding of indecency under a statute, 18 U.S.C. 1464, that likewise uses the term "indecent," where the term was construed (after the offending broadcast) to incorporate the same patent offensiveness requirement

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[2] The language quoted from our opening brief did not purport to state Congress's understanding of "indecent" but gave a description of the larger category of "dial-a-porn" at which Congress took aim in enacting the commercial indecency ban.

[3] That definition is taken from the FCC definition used in *Pacifica.* Two changes are made: a reference to the telephone medium is substituted for the FCC's reference to the broadcast medium, and the definition's incorporation of a time-of-day restriction is omitted. See Gov't Br. 19 n.12. Both changes are mandated by Congress's borrowing of the definition for Section 223(b), which covers telephone rather than broadcast communications and which imposes a ban without regard to the time of the communication.

contemplated in Section 223(b). Second, this Court's obscenity decisions in criminal cases demonstrate that the availability of criminal remedies under Section 223(b) does not render its patent offensiveness requirement unconstitutionally vague: the requirement gives speakers sufficient warning of what is proscribed. Thus, in *Miller*, the Court specifically approved state statutes that criminalized "[p]atently offensive representations or descriptions of ultimate sexual acts * * * [or] of masturbation, excretory functions, and lewd exhibition of the genitals," with patent offensiveness judged by community standards. 413 U.S. at 25.[4] In other criminal obscenity cases, this Court has consistently rejected vagueness challenges, even where the statutes at issue merely used the term "obscene" or other broad standards, as long as the standards were construed to incorporate the patent offensiveness requirement. *E.g.*, *Ward* v. *Illinois*, 431 U.S. 767 (1977); *Smith* v. *United States*, 431 U.S. 291, 308-309 (1977); *Hamling* v. *United States*, 418 U.S. 87, 113-114 (1974). For the same reasons, there is no valid vagueness objection to Section 223(b)'s patent offensiveness requirement or, therefore, to its indecency prohibition.

2. Prior to arguing that Section 223(b) is unconstitutional on its face, Sable contends (Br. 17-20) that Section 223(b)'s indecency ban suppresses a substantial amount of protected speech. That contention rests in part on mis-

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[4] In the obscenity context, two additional requirements must be met: the material must, taken as a whole, appeal to the prurient interest and have no literary, artisitic, political, or scientific value. See *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). Those requirements make the obscenity standard less broad than it would otherwise be, but they have no bearing on whether the patent offensiveness component of the standard, which a jury must apply in determining whether material is obscene, is unduly vague (since vagueness and overbreadth are distinct objections).

characterizations of, and unwarranted assumptions about, the scope of Section 223(b)'s indecency standard. It also rests on a misinterpretation of the standards that determine the range of Section 223(b)'s applications that the Court should consider in adjudicating Sable's facial overbreadth challenge.

As this Court has made clear, Sable may prevail on its facial challenge to Section 223(b) only if (1) the statute has no permissible application or (2) the statute is "substantially" overbroad in that the statute is invalid in a substantial portion of its applications, "realistically" determined. See, *e.g.*, *New York State Club Ass'n* v. *City of New York*, 108 S. Ct. 2225, 2233 (1988); *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 798, 801 (1984); *New York* v. *Ferber*, 458 U.S. 747, 770 (1982); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). It is beyond dispute that Section 223(b)'s indecency ban has constitutional applications (to, for example, speech that is in fact obscene), and Sable does not argue to the contrary. Sable's facial challenge therefore requires it to establish and the Court to find, more than merely as a hypothetical matter, that Section 223(b) has a substantial number, or proportion, of invalid applications.

Sable seeks to do so by attempting to focus this Court's inquiry on the speech of others not before the Court. That effort is misguided. The record in this case, together with the FCC pre-1988 administrative proceedings and the several *Carlin* decisions reviewing those proceedings, demonstrates that there are tens and perhaps hundreds of millions of calls annually to the dial-a-porn services that Congress focused on in enacting the indecency ban—telephone messages designed to arouse sexual responses. See Gov't Br. 6-7.[5] This Court's analysis of Sable's facial

[5] While Sable's "frankly sexual" messages are designed to produce sexual arousal (see Gov't Br. 23 n.15), some of its messages may not have "prurient appeal" in the sense that they appeal to "sexual

challenge should focus exclusively on whether its applications to such pornography are valid, for there is no basis on which to conclude that the other kinds of speech to which Sable points make up a substantial portion of Section 223(b)'s applications.

Thus, Sable suggests that the indecency ban applies to "unseemly" or "unbecoming" language available from "dial-a-joke" telephone services, as well as to vulgar or profane language used in "rap" music available by telephone. Br. 20. As we have explained, however, Section 223(b) does not use "indecent" to apply to all such language. The indecency ban does not apply unless the speech, in context, is patently offensive in its descriptions of sexual or excretory activities or organs. Sable suggests no reason to believe that a significant amount of telephone speech other than dial-a-porn meets that requirement.[6]

Sable also suggests that a substantial amount of commercial indecent material is received over telephone lines by computers and fax machines. Br. 20. But it is inappropriate to conclude in this facial challenge that material

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responses over and beyond those that would be characterized as normal." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. at 498. Hence, even aside from the question of literary, political, artistic, or scientific value, some of Sable's messages may not be legally obscene even though they are sexually explicit.

[6] Amici Action for Children's Television et al. (Br. 4-5, 27-28) discuss various kinds of speech—and matters that have come before the FCC—to which an indecency ban in *broadcasting* might hypothetically apply, but they give no examples at all of telephone indecency, which is all that is before this Court. Even in the broadcasting context, moreover, amici vastly overstate the scope of "indecency." The Commission has never suggested that "informational programs about serious health issues like AIDS" (Br. 5) would be found indecent because of their use of sexually explicit speech. The

received by such devices comes within Section 223(b)'s ban on communications "by means of telephone," construed in light of the congressional concern with children's access and in light of what may be a somewhat different constitutional calculus for devices other than ordinary telephones. The question whether the statute covers computers, fax machines, or "desk-top publishing," none of which are involved in Sable's telephone dial-a-porn, should be left for a future case. Moreover, even if such material is covered, there is no basis for concluding that it represents a substantial portion of the statute's applications. Nor is there reason to believe that a substantial amount of such material is both patently offensive and commercial (notably, computer bulletin boards typically are non-commercial).[7]

Accordingly, the Court should consider Sable's facial constitutional arguments only with regard to commercial indecent telephone pornography, which, as far as the records suggests, comprises virtually all of Section 223(b)'s

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Commission has found indecency only in a few instances and has emphasized that material is never indecent because of the subject matter alone. Rather, the Commission has found indecency only when the material included graphic descriptions of sexual and excretory activities and organs, was "presented in a *manner* that is patently offensive," and was broadcast at a time when there was a reasonable risk that children would listen. See *Infinity Broadcasting Corp.*, 3 F.C.C. Rcd 930, 932-933 (1987). We note, too, that the Commission has dismissed most of the indecency complaints that have been filed with it, including a number of the examples cited by amici (Br. 28 nn. 116-118).

[7] Amicus Association of Interactive Information Providers is incorrect to the extent it suggests that Section 223(b) covers all so-called "chat" or "gab" lines. Conversations on such lines are not covered by Section 223(b) if the only parties who engage in indecent speech are callers who are not doing so "for commercial purposes" (Section 223(b)). The situation would be different if the "host," who is paid by

applications. If, as we argue, the indecency ban is valid as to that category, then the ban should be upheld as a "statute whose legitimate reach dwarfs its arguably impermissible applications." *New York* v. *Ferber*, 458 U.S. at 773. If other applications of the statute, not proven on the record, may raise other constitutional problems, then " 'whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.' " *New York State Club Ass'n* v. *City of New York*, 108 S. Ct. at 2235 (quoting *Broadrick* v. *Oklahoma*, 413 U.S. at 615-616).

3. Sable's contention (Br. 21-32) that Section 223(b)'s indecency ban is unconstitutional on its face should be rejected. Congress reasonably concluded that there is no effective lesser measure, given the distinctive accessibility of the telephone medium to children, that would serve the compelling and traditional governmental interest in "prevent[ing] the general dissemination of [patently offensive sexual] speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat." *FCC* v. *Pacifica Found.*, 438 U.S. at 758 (Powell, J., concurring in part and concurring in the judgment).

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the service provider, also engaged in such speech. Of course, subsection (a) of Section 223, which is not at issue here, covers certain indecent speech by those who initiate phone calls, even if not for commercial purposes.

As we submitted in our opening brief (at 23-24 n.15), the category of live two-way commercial telephone pornography is distinct from the category of pre-recorded commercial telephone pornography that Sable sells, is the subject of litigation in another case, and should not be addressed here. As an exception to the ordinary bar on third-party standing, the overbreadth doctrine has been narrowly construed (see *City Council* v. *Taxpayers for Vincent*, 466 U.S. at 798-801) and should not be extended to apply to a distinct category of speech that may require a somewhat different analysis and is already being addressed elsewhere.

The statute therefore passes even Sable's proposed test, in that it is "narrowly drawn" to serve a "sufficiently substantial government interest" (*Schad* v. *Mount Ephraim*, 452 U.S. at 68, quoted at Sable Br. 19), let alone the less "exacting" approach suggested in *Pacifica* (see Gov't Br. 24-26). None of Sable's arguments undermines that conclusion.

a. With respect to the congressional findings that support Section 223(b), Sable does not dispute that Congress may legitimately judge indecent sexual speech to be presumptively harmful to minors or that Congress has a compelling and traditional interest in protecting minors from indecent sexual speech, especially in the privacy of the home, except as their parents may see fit to allow them access to it. See, *e.g.*, *New York* v. *Ferber*, 458 U.S. at 756-757; *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944).[8] Nor does Sable openly dispute Congress's conclusion that the problem of children's access is a substantial one. Indeed, Sable effectively acknowledges the point when it concedes (*e.g.*, Br. 22) the validity of the 1983 version of Section 223(b) and of the FCC's pre-1988 requirements of credit cards, access codes, or scrambling devices as means to screen out children's calls.[9]

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[8] Amicus San Francisco AIDS Foundation suggests that telephone pornography may have social value in encouraging "safe sex" as a substitute for sexual conduct that puts people at risk for AIDS. That suggestion would seem to apply equally to obscene speech and merely indecent speech. Moreover, even aside from the weak evidentiary foundation offered for the suggestion, it is surely legitimate for Congress to make the judgment that there are compelling competing interests in protecting children from such pornography, especially given the range of alternative means available to "eroticize safe sex."

[9] Sable's attempt to cast aspersions on the evidentiary foundation for Congress's judgment (Br. 9) is unwarranted. The congressional

Sable likewise does not directly dispute Congress's finding that the alternatives proposed by the FCC prior to 1988 would not effectively remove children from the audience for dial-a-porn. See Gov't Br. 13, 33.[10] Sable does suggest that the FCC reached a contrary conclusion (Br. 25), but that suggestion is incorrect. The FCC was pursuing the limited goal of "reducing" access by minors while preserving dial-a-porn for adults (Gov't Br. 11), and it found only that its proposed measures would be the " 'most effective method currently available' " to achieve

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judgment is supported by the FCC's administrative proceedings, by common sense (given children's access to the telephone and curiosity about sex), and by testimony before Congress. See *Telephone Decency Act of 1987: Hearing on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 215 (1987) (testimony of U.S. Attorney Brent Ward) (reporting "literally hundreds of calls from parents of minor children who had placed calls to Carlin's New York City numbers"). Of course, there are obvious problems with obtaining reliable information about how many children call dial-a-porn numbers by scientifically validated surveys.

[10] Accordingly, Sable's suggestion (Br. 25 & n.24) that no deference is due the congressional findings is irrelevant. In fact, the Court, while conducting searching inquiries into the justifications for restrictions on speech, has regularly accorded respect to legislative and administrative judgments in the First Amendment context. See, *e.g.*, *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 340-344 (1986); *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 508-509 (1981) (plurality opinion); *Pacifica*, 438 U.S. at 760 (Powell, J., concurring in part and concurring in the judgment) (FCC judgment entitled to respect); *Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 60-62 (1973); *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 102-103 (1973); *Ginsberg* v. *New York*, 390 U.S. at 634-643.

We note that *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), which we cited in our opening brief, did involve a First Amendment issue. See 473 U.S. at 334-335.

that deliberately compromised goal (*id.* at 10). The FCC several times acknowledged that its proposals would not make it impossible for children to gain access to dial-a-porn (see Gov't Br. 35) and never stated that its proposals were effective in achieving that unalloyed goal.

More indirectly, Sable also attacks the congressional finding by contending (Br. 26-29) that our defense of Section 223(b)'s indecency ban—as well as the congressional judgment that no lesser measures would be effective—rests on a "most enterprising minor" test. But that is a test of Sable's own devising, not ours or Congress's. Moreover, Sable is wrong in suggesting by that phrase that Section 223(b)'s commercial indecency ban is not necessary because, as Sable obliquely hints, it merely plugs the last small hole in an otherwise almost-airtight regulatory structure proposed by the Commission and endorsed by Sable. The unexpressed premise of that suggestion is incorrect.

Thus, under Sable's proposed less restrictive alternative, Sable could *either* require credit card payment *or* require an access code *or* scramble its messages—and it could choose among those options for different lines. A minor could therefore gain access to Sable's messages in any of several ways: by obtaining any person's credit card number; by obtaining any access code; or by finding a telephone with a descrambling device or, indeed, by purchasing such a device (they are inexpensive).[14] Congress could reasonably conclude based on common knowledge, as can this Court, that it hardly takes an unusually enterprising minor to be successful in each, let alone any one, of those means of gaining access to Sable's messages and, given the

[14] The beep-tone device touted by amicus Olivo, which Sable nowhere endorses, would present similar problems of relatively easy circumvention—by, for example, using any telephone without such a device. With respect to various forms of blocking at the carrier's facilities, Sable has never suggested that any such alternative would be

probability of minors' sharing of information, that it would not be at all unlikely that large numbers of minors would gain access to dial-a-porn. In short, contrary to Sable's argument, Congress, in adopting the indecency ban, was not rejecting alternatives that were just shy of perfection or that were practically "childproof"; Congress reasonably determined that the realistic consequence of not adopting the ban would have been that an appreciable number of minors would gain unsupervised access to patently offensive sexual speech. As *Pacifica* makes clear, Congress may prevent that result.

b. Sable's efforts to devalue the congressional interests at stake here are equally unavailing. Sable observes (Br. 23) that its services do not make any person a captive audience as in *Pacifica,* because "contact with Sable's telephone messages is initiated by the individual, not by Sable, and only by deliberately dialing a particular sequence of numbers when the individual has made an informed decision to summon an adult telephone message into his home." But that statement ignores the critical distinction between adults and children. When the "individual" making the call is a minor, the defense of voluntary exposure carries little if any weight in the context of patently offensive sexual speech. This Court has long held that government may constitutionally prohibit a minor's voluntary purchase of sexual material that an adult is constitutionally entitled to purchase. *Ginsberg* v. *New York, supra.*

Sable also suggests (Br. 23) that dial-a-porn does not impair privacy-based interests of parents. That is not so:

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acceptable. Moreover, customer-initiated blocking would surely leave many telephones unblocked; and there is no record basis for concluding that "reverse blocking" (in which particular lines would be blocked unless customers requested that they be *un*blocked) would be feasible for many carriers or would be effective in precluding children's access.

such interests are impaired in at least two ways. Dial-a-porn impairs " 'the sanctuary of the home' " (*Frisby* v. *Schultz*, 108 S. Ct. 2495, 2502 (1988)) by placing an attractive nuisance in the home that parents must then take affirmative steps to remove; indeed, with Sable's proposed measures, the nuisance cannot be reliably removed at all (short of removing the telephone).[12] Moreover, the availability of dial-a-porn outside the home interferes with the ability of parents to control their children's sexual education, which is the time-honored justification for statutes that require vendors to ensure that they do not sell various sexual materials to minors. See *Ginsberg* v. *New York*, *supra*.

As a practical matter, of course, parental control diminishes as minors approach the age of majority. Sable Br. 28 (noting some minors' alternative access to indecent materials). But just as that fact does not undermine the justification for banning sales of indecent material to minors (a line must be drawn, as vendors cannot judge individual minors' maturity), it does not undermine the justification for ensuring that indecent telephone messages are not accessible by unsupervised minors. To suggest otherwise is to attack the basis of *Ginsberg*. In any event, Sable's point is quite irrelevant for younger children. Children can use the telephone and gain access to dial-a-

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[12] In *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983), the Court distinguished *Pacifica's* reliance on the intrusion into the home that broadcasts represent by pointing out that mail is less "intrusive and uncontrollable." Of course, "each medium of expression presents special First Amendment problems." *Pacifica*, 438 U.S. at 748. As we explained in our opening brief, the telephone, which is physically present in the home, is more akin to broadcasting than to the mail in its intrusiveness and uncontrollability. Also, the prophylactics advertisements at issue in *Bolger* are far different from the indecent material at issue here, and the governmental interests at stake are therefore also different.

porn (*e.g.*, by punching in an access code or using a simple descrambler attached or held up to the earpiece of the telephone) long before they develop the sort of independence (and physical maturity) that might enable them to obtain indecent materials elsewhere (*e.g.*, by passing themselves off as adults).

c. Relying on *Butler* v. *Michigan*, 352 U.S. 380 (1957), Sable argues (Br. 27-32) that Section 223(b) is unconstitutional because it renders commercial indecent speech unavailable to adults by telephone and that the availability of such material by other means is constitutionally irrelevant. Those arguments misconstrue *Butler* and ignore even the "narrow tailoring" standard that Sable itself promotes.

Thus, as we explained in our opening brief (at 35-36), when written materials are at issue, the compelling governmental interests in preventing unsupervised minors' access to indecent material are effectively served by statutes that require vendors to ensure that their customers are not minors.[13] Hence, under *Butler*, a total ban on the sale of written indecent material cannot be justified. By contrast, with pre-recorded telephone messages, as with broadcasting, there is no intervening vendor at all, let alone one who can reliably separate minors and adults among the audience. See Gov't Br. 35-36. For that reason, there is no less restrictive alternative that serves the compelling governmental interests here, whereas there was in *Butler*.

Moreover, the law at issue in *Butler* was anything but narrowly tailored: it sweepingly banned all commercial and non-commercial transactions in materials, written or otherwise, that contained certain non-obscene sexual matter and left available no alternative sources of any such

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[13] Contrary to Sable's suggestion (Br. 28), the point of commercial sale is significant in the First Amendment analysis because it presents an opportunity to screen minors.

matter. Here, by contrast, the indecency ban is limited to the telephone medium and to commercial sale of that speech; and it leaves adults free to purchase indecent aural (or video) messages on tape or in other forms. Contrary to Sable's suggestion (Br. 29-31), those facts are critical to applying Sable's proposed test: they are essential to judging whether the statute is "narrowly drawn" to serve a "sufficiently substantial government interest." *Schad* v. *Mount Ephraim*, 452 U.S. at 68. Indeed, *Pacifica* specifically relied on the availability of alternative sources of indecent material in upholding the FCC ban on daytime broadcasting of the particular material at issue. 438 U.S. at 750 n.28. Of course, we do not suggest (contra, Sable Br. 31) that the availability of alternative sources of material is in itself sufficient to justify a ban in a particular medium:[14] that is only one factor in the analysis, which concentrates on the overall justification for the measure given the distinctive characteristics of the medium at issue.

d. Finally, Sable asserts (Br. 21) that these cases involve an unprecedented "total exclusion from an entire communications medium of a whole category of protected speech." Section 223(b), however, does not even ban all interstate indecent speech from the telephone medium: it permits such speech if not made for commercial purposes. Of course, while the fact that speech is sold does not take it outside the First Amendment, "[t]he selling * * * brings into the transaction a commercial feature" that the Court has consistently relied on in upholding various laws affecting speech. *Breard* v. *Alexandria*, 341 U.S. 622, 641-642 (1951) (upholding ban on door-to-door commercial soliciting); compare *Martin* v. *Struthers*, 319 U.S. 141

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[14] It is that unwarranted suggestion—and not the point that alternative sources are a relevant factor in the analysis, as the Court stated in *Pacifica*—that is rejected by the decisions cited by Sable (*e.g.*, *Bolger*, *Schad*).

(1943) (invalidating ban on non-commercial distribution of material door-to-door). See, *e.g.*, *Paris Adult Theatre I* v. *Slaton*, 413 U.S. at 57-69; *United States* v. *Reidel*, 402 U.S. 351 (1971); see also *Splawn* v. *California*, 431 U.S. 595 (1977) (discussing significance of pandering); *Ginzburg* v. *United States*, 383 U.S. at 470 (same).

In any event, this Court has never ruled that a ban on a particular category of speech in a particular medium—if otherwise found justified under the proper standards after searching inquiry—is automatically invalid because it is a ban. As the Court said in *Taxpayers for Vincent* in explaining that "[a] distributor of leaflets has no right simply to scatter his pamphlets in the air—or to toss large quantities of paper from the window of a tall building or a low flying airplane," "[c]haracterizing such an activity as a separate means of communication does not diminish the State's power to condemn it as a public nuisance." 466 U.S. at 809. And the Court said only last Term, in another case that implicated the privacy of the home, "[a] complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby* v. *Schultz*, 108 S. Ct. at 2502-2503.

Furthermore, the Court has upheld or expressed approval of broad bans on speech in particular "media." See, *e.g.*, *Taxpayers for Vincent*, *supra* (ban on all signs on public property); *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490 (1981) (approving prohibition on billboards, see 466 U.S. at 807); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (sound trucks); *Breard* v. *Alexandria*, *supra* (commercial door-to-door soliciting). Although such bans typically involve time, place, or manner restrictions and are content-neutral (but not always, see *Breard*), that fact makes them more sweeping in their effect on speech than Section 223(b), which applies only to commercial indecent or obscene messages and leaves all other messages unregulated. It

would stand the First Amendment on its head to condemn Section 223(b) because it is more narrowly tailored by content, if that tailoring is properly justified. Here, as we have explained, Section 223(b)'s singling out of commercial indecent speech—which is, after all, a viewpoint-neutral category, see *Cornelius* v. *NAACP Legal Defense & Educ. Fund,* 473 U.S. 788 (1985)—is amply justified by the well-recognized unique character of sexual speech in relation to minors.

B. ***No. 88-515 (Obscenity)***

Notwithstanding that obscene speech may validly be proscribed, Sable argues (Br. 37-47) that Section 223(b)'s prohibition of obscene commercial interstate speech is invalid. Sable contends that the statute has the unconstitutional effect of subjecting it to prosecution for speech that is not obscene in Los Angeles because it lacks the ability to refrain from transmitting the same speech to another community where it might be considered obscene, thus placing an unconstitutional condition on its protected speech. Sable suggests that Congress must add to the obscenity ban a requirement that local exchange carriers offer to block calls from outside the local community (a measure that Sable has never before suggested it would find to be a satisfactory response to its concerns). Moreover, without such government-imposed blocking, Sable argues, Section 223(b) would unconstitutionally incorporate a national standard of obscenity. Sable's argument is wholly inadequate to support its facial challenge for several reasons.

First, the argument fails as a facial challenge. Even on Sable's terms, the statute is capable of valid application—for example, a prosecution in Los Angeles for violating Los Angeles obscenity standards. Any requirements concerning venue or the proper standards to

apply can and must be raised in a particular enforcement proceeding. Moreover, since no other speaker is in a different position with respect to the obscenity ban from that of Sable, there is no warrant in this case for considering any "substantial overbreadth" argument based on third parties' speech. See *Taxpayers for Vincent*, 466 U.S. at 801-802. Indeed, Sable does not rely on any such argument in its obscenity challenge. Hence, the facial challenge fails. See *New York State Club Ass'n* v. *City of New York*, 108 S. Ct. at 2233.

Second, the premise of Sable's challenge dissolves if Section 223(b) properly incorporates community standards for obscenity that do not vary from local area to local area. Sable is wrong in arguing (Br. 44-46) that the Court in *Miller* rejected the application of national standards. In fact, the Court in *Hamling* v. *United States*, *supra*, affirming a conviction based on a jury instruction that directed the jury to apply " 'standards generally held throughout this country' " (418 U.S. at 103), rejected the suggestion that *Miller*, which in fact applied a statewide standard, itself prohibited the application of national standards. 418 U.S. at 103-104. While the Court in *Hamling* concluded that the "contemporary community standard" instruction in the case before it should have directed the jurors to apply the standards of the community from which they came (*id.* at 105-106), it found that the national-standard instruction given did not make any difference to the outcome of the trial. Moreover, as we pointed out in our opening brief (at 37-38), *Hamling* stressed only that obscenity must not be judged on the basis of personal sensitivities of jurors, and neither *Hamling* nor any of this Court's other decisions has addressed the question in a setting involving a national communications technology like the telephone network or federal agency administrative enforcement. Whether some kind of broader-than-local standards would be proper and should be developed in the

present setting is therefore an open question, one that should be left for an as-applied challenge in which it might make a difference.

Third, even on the assumption that local standards must apply, Sable's "double bind" (Sable Br. 38) argument is unsupported in the record or in case law. Of course, the government may validly proscribe speech in a particular community that is obscene in that community, and even Sable concedes that it is free to contract with its local exchange carrier (Pacific Bell) to arrange for screening of out-of-area calls. Sable cites no precedent for its argument that a prohibition of proscribable conduct is rendered invalid because the government does not take the *additional* step of imposing some other requirement that a third party engage in certain conduct. Certainly the "unconstitutional condition" cases cited by Sable (Br. 41) require no such thing.[15] Moreover, Sable not only failed to join Pacific Bell in this lawsuit but has offered no record support for its claim that it cannot obtain (for a sufficient price) a service that would screen out-of-area calls. Nor has Sable suggested that it has pursued legal remedies—for example, by complaining to the FCC or to state regulatory authorities—seeking to compel Pacific Bell to provide Sable the service. In these circumstances, there is no basis for Sable's facial challenge.

Finally, it appears that the factual premise of Sable's argument is mistaken, because Sable does (or shortly will) have the ability to ensure in various ways that its local speech is not accessible elsewhere. We are informed by

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[15] Even if "special justification" were required here (Sable Br. 41), it is present: a community's legitimate interest in ridding itself of sales of obscene speech is sufficient to justify the effect on other communities in which that frankly sexual speech, while still lacking literary, political, artistic, or scientific value, might not quite be obscene.

Pacific Bell that, in February 1989, it asked all of the other local exchange carriers in the nation (as well as AT & T) to block, at their facilities, calls coming into Pacific Bell's "976" numbers. Compliance with that request is now under way. Moreover, on March 22, 1989, in a proceeding to which Sable was a party, the California Public Utility Commission approved a plan, which it expects to have in operation by mid-July, that would enable Sable to offer a purely local "900" service – that is, a service accessible (by presubscription) only within the "local access transport area," which in the case of Sable is an area surrounding Los Angeles. *In re Application of Pacific Bell,* Dec. No. 89-03-061 (Applic. No. 88-04-004) (Cal. P.U.C. Mar. 22, 1989); *PUC Approves Pacific Bell's 900 Service,* PUC News (Applic. No. 88-04-004) (Mar. 22, 1989) (news release). In these circumstances, Sable simply is not (or soon will not be) in the "double bind" that it alleges.[16]

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the district court holding Section 223(b) invalid insofar as it applies to indecent speech should be reversed and the judgment holding Section 223(b) valid insofar as it applies to obscene speech be affirmed.

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[16] There may be other means, too, by which Sable can target its messages to a local audience.

Of course, if, contrary to our submission, the Court finds that Sable's facial challenge requires resolution of any factual issues, those issues may be addressed at trial. The ruling before this Court is the denial of a preliminary injunction against Section 223(b)'s obscenity provision. That ruling is properly affirmed in any event, because in the district court Sable did not raise these factual issues or offer any support for its present contentions.

Respectfully submitted.

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